M/s Vishnu Prakash R.Pungaliya vs. The State of Rajasthan & Ors.

SB Civil Writ. Petition No.1624/2006

Date of Order: 04th July, 2006.

PRESENT

HON'BLE MR.JUSTICE BHAGWATI PRASAD

Mr.Sangeet Lodha for the petitioner/s.
Mr.N.M.Lodha, Addl.Advocate General.
Mr.Anand Purohit for respondent No.4.

The present writ petition is filed by the petitioner impugning the act of the respondent Public Health & Engineering Department by virtue of which the petitioner has been excluded from consideration in relation to NIT-1/2005-06. The petitioner was eliminated at the stage of considering the financial bids. As per the NIT the petitioner was required to fulfil certain mandatory conditions for being considered eligible to participate in the NIT. The financial criteria was fixed as below:-

" a) The tenderer should have average annual turn over of last 5 years (FY2000-01TO 2004-05) at least of Rs.227 lacs,

> Copies of audited balance sheets of last 5 FY shall be enclosed for assessing average annual turn over.
>
> b) Net worth of tenderer should be at least Rs.76 lacs on 31/3/05.
>
> Certificate of charted accountant in original or duly notarised shall be enclosed.
>
> c) Minimum Bank Credit Limit (both fund & non-fund based) on 1/4/2005 or thereafter should be Rs.205 lacs."

Petitioner's case was that he could not have been eliminated at the stage of financial bids because he had produced the certificate of the Chartered Accountant showing his desired net worth even after deducting the same comes out to be Rs.75.8 lacs . Another Chartered Accountant M/s L.M.Lodha & Co. Also certified the Net worth as Rs.1.7 crores . The certificate of another Chartered Accountant became necessary to be produced in the background that the Department has asked for production of certificate from another Chartered Accountant.

Anx. 8 certificate issued by R.P.Moondra, incorporated Capital, Long terms Loans from family members of the partners to assess the net worth of the petitioner. The finance committee was not

satisfied and, therefore, certificate was demanded from another Chartered Accountant showing that the net worth of the petitioner firm was atleast Rs.76 lacs. In response to that M/s.L.M.Lodha &Co.'s certificate was filed by the petitioner which showed the worth as Rs.1.57 and even crores. This included capital contribution, general reserves, subsidies and other reserves , profit / surplus and deposits by the family shareholders / partners and directors.

Considering all the documents produced by the petitioner the Department came to the conclusion that it does not fulfil the criteria as laid down and, therefore, the petitioner was eliminated at the stage of financial bids and at the time when the tenders were finally considered his offer was not considered . The respondent Department has come in reply and has stated that the requirement of NIT in financial criteria has been that tenderer should have net worth atleast Rs.76 lacs on 31.05.05. The petitioner on the instant date had less than this amount worth according to the Department. This was the bare minimum an d not the the ultimate requirement . Further even after the opportunity was provided to the petitioner no proper certificate and certification about the net worth was produced which turned out to be less than the least requirement . The Department has

also mentioned in its reply that the petitioner was registered as a AA-contractor only by certificate dated 07.01.06. This registration was temporary for six months. The Department has also noticed that though the petitioner was registered as a contractor of AA-category earlier but his registration was cancelled in the year 2000.

The learned counsel for the petitioner, arguing in favour of his submissions submitted that award of a contract is not an ordinary process and is required to be governed by such principles which have been time and again enunciated by the Courts. He has placed reliance on Air India Ltd. vs. Cochin International Airport Ltd. (2000) 2 SCC 617). He has also placed reliance on Tata Cellulor vs. UOI (1994) 6 SCC 651). He has further placed reliance on State of A.P. vs. Govardhan Lal Pitti (2003) 4 SCC 739).

The petitioner claimed that though there are no direct mala fides available against the authority but it is malice in law which is to be considered to judge the probable and reasonableness of the action of the respondent. The petitioner was qualified and he was wrongfully excluded from being considered as a proper bidder in the contract.

Per contra, the learned counsel for the respondent urged that it is wrong to state that the petitioner was qualified. He was required to have a net worth of at least Rs.76 lacs. His net worth as calculated from the certificate given in the Chartered Accountant fall below the Rs.76 lacs. The petitioner though has claimed rounding off the figure but such rounding off may bring him within the lowest possible figure of Rs.76 lacs but that is the least he should have and this bare minimum requirement though canvassed to be fulfilled is by rounding off only and that does not give the petitioner a very solid foundation to stand. Further, the petitioner was earlier disqualified for his misconduct and his registration as a contractor in the AA -category was cancelled. He was registered in January 2006 provisionally for six months. Thus his past performance cannot be said to be of such nature which is very promising. There being no minimum requirement available in his favour his bids could not have been considered by the Department. He has been ousted as his net worth was not found to be falling within the category of minimum required worth.

I have considered the rival submissions and have perused

the record.

The requirement of net worth is to the tune of Rs.76 lacs or 1/3rd of the turn over. The petitioner is only on the lowest ebb. He, in the past, has been penalised by a cancellation of his certificate. Currently he was registered provisionally for six months. No direct mala fides are involved and alleged. The question of legal mala fides was not to be of great importance in the back ground of the Supreme Court cases. The Hon'ble Supreme Court in Air India Ltd.'s case (supra) has observed as under -

> " The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations ; before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation , for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not

> amenable to judicial review, the court can examine the decision – making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference , the court should intervene."

The Hon'ble Supreme Court has been time and again stressing that Courts while judging the propriety and administrative matter has to see what it can do in the given circumstances. Unless there is an unfairness of the greater magnitude no interference is called for-

> "Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review."

The Court has to see that Wednesbury unreasonableness is judged in the right perspective. Where the petitioner has not been found to be properly qualified it cannot be said that any illegality has been committed by the respondents in not considering the petitioner to be fully qualified to be considered. In absence of mala fides the argument of legal mala fides would not take the petitioner 's case at a long distance because he was at the lowest ebb of required qualification. Rather, lower than the lowest and in that background, if he has been ousted at the level of final bids it cannot be said that any illegality has been committed. There is no force in the writ petition. The petition being meritless is dismissed.

(BHAGWATI PRASAD), J.

L.George